1965

Ray Tanner and Edgar L. Vance for themselves and as a Class Action on Behalf of All Persons Similarly Situated v. Intermountain Farmers Association, aka Utah Poultry and Farmers Cooperative : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

AY TANNER and EDGAR L. ANCE for themselves and as a ss action on behalf of all persons milarly situated.

Plaintiffs-Appellants

vs.

TERMOUNTAIN FARMERS SSOCIATION aka Utah Poultry d Farmers Coop,

Defendant-Respondent

No. 10306

BRIEF OF RESPONDENT

Appeal from the District Court of
Salt Lake County, State of Utah
Judge Joseph G. Jeppson presiding.

RONALD C. BARKER and
CLARENCE J. FROST
2870 South State Street
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

HOMAS GREENE
r, Wilkins & Cannon
Continental Bank Building
Lake City 1, Utah
rneys for Defendant-Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2-8
ARGUMENT	8-36

POINT I

TRIAL COURT'S JUDGMENT OF DISMISSAL WITH PREJUDICE SHOULD BE AFFIRMED AS TO THE INDIVIDUAL PLAINTIFFS	8
A. COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO SET FORTH A LEGAL INTEREST OR STANDING TO SUE	10
B. COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO COMPLY WITH OTHER UTAH RULES OF CIVIL PROCEDURE AND PRIOR ORDERS OF COURT	15
1. Failure to Comply with Court Order	15
2. Failure to Show Cause for Repeated Amendments—Rule 15(a)	18
3. Failure to File Clear and Comprehensible Pleading—Rule 8(e)	21
C. THE COMPLAINT WAS RES JUDICATA AGAINST THE PLAINTIFF TANNER, AND THEREFORE WAS PROPERLY DISMISSED AS TO HIM	23

POINT II

THE TRIAL COURT'S JUDGMENT OF DISMISSAL WITH PREJUDICE SHOULD BE AFFIRMED AS TO THE CLASS ACTION	27
A. NO COMMON "CLASS" IS DEFINED OR DELINEATED	27
B. PLAINTIFFS DO NOT BELONG TO THE "CLASS"	30
C. PLAINTIFFS DO NOT ADEQUATELY REPRESENT ANY "CLASS"	32
CONCLUSION	36

AUTHORITIES CITED

Cases:

Page

Blake v. DeVilbiss Co., 118 F2d 346 (CA6, 1941) 16, 17, 21, 22

Burningham v. Burke et al, 67 Utah 90, 245 P 977 (1926) .. 9

Carrigan v. California State Legislature, 263 F2d 560 (CA9, 1959) cert den 359 US 980 22

Clark v. Chase National Bank, 45 F Supp 820 (SDNY, 1942) 30

East Mill Creek Water Co. v. Salt Lake City, 108 Utah 315, 159 P2d 863 (1945) 24, 25

Farmers Co-operative Oil Co. v. Socony-Vacuum Oil Co., 43F Supp 735 (ND Iowa, 1942) modified, 133 F2d 101 CCA8, 1942), remanded, 51 F Supp 440 (1943) 12, 13, 14

Feight v. Mathers et al, 153 Nebraska 839, 46 NW2d 492. (1951) 17

Feinberg v. Leach, 243 F2d 64 (CA5, 1957) 12

Frank Adam Electric Co. v. Westinghouse Electric Mfg. Co., 146 F2d 165 (CA8, 1945) 20

Florasynth Laboratories, Inc. v. Goldberg, 191 F2d 877 (CA7, 1951) 26

Friedman et al v. Trans-American Corporation, 5 FRD 115 (DADel, 1946) 20, 21

Hansberry v. Lee, 311 U.S. 32 (1940) 30, 32

Hartford-Empire v. Obear-Nester Glass Co., 95 F2d 414 (CA8, 1938) 20

Heathman v. Hatch, 13 U2d 266, 372 P2d 990 (1962) 11

Heay v. Phillips, 201 F2d 220 (CA9, 1952) 20

Hicky v. Illinois Central R.R., 278 F2d 529 (CA7, 1960) .. 30

Kirsch v. Barnes, 157 F Supp 671 (DC 1957) aff'd 263 F2d 692 (CA9, 1959) 20

Laughlin v. Garnett, 138 F2d 931 (CADC, 1943) 19, 20

N.L.R.B. v. Guernsey-Muskingum Electric Co-op, Inc. 285 F2d 8 (CA6, 1960) 20

Pacific Inter-Club Yacht Assn. v. Morris, 197 F Supp 218 (ND Calif. 1960), 288 F2d 886 (CA 9, 1961) 27

Salt Lake City v. Utah Lake Farmers Association, 4 U2d 14, 286 P2d 773 (1955) 30, 32, 35

Shall v. Henry, 211 F2d 226 (CA7, 1954) 10, 19

State v. California Packing Corporation, 105 Utah 182, 141 P2d 386 (1943) 11, 12
Stillinovich v. Ottilia Villa, Inc., 14 U2d 222, 381 P2d 210 (1963) 25
Strahle-Johnson Supply Co., 1 FRD 279 (ED Tenn, 1940) 22
Tanner v. Utah Poultry & Farmers Coop., 15 U2d 145, 389 P2d 62 (1963) 3
Walter Reade's Theaters v. Loew's Inc., 20 FRD 579 (SDNY, 1957) 18
Waters v. Waters, 100 Utah 246, 113 P2d 1038 (1941) 9
Wheadon v. Pearson, 14 U2d 45, 376 P2d 946 (1962) 25

RULES CITED

Page
7(c) U.R.C.P. 8
8(a) U.R.C.P. 8, 10, 14
8(c) U.R.C.P. 8, 23, 25
8(e) U.R.C.P. 8, 16, 21, 22, 23
9(a)(1) U.R.C.P. 8
12(b)(6) U.R.C.P. 8, 23, 26
12(c) U.R.C.P. 22, 23
15(a) U.R.C.P. 18, 19
23(a) U.R.C.P. 28, 29, 30, 32
41(b) U.R.C.P. 8, 15, 16, 18

STATUTES CITED

Utah Code Ann. (1953) Section 3-1-1 3

TEXTS CITED

A.L.R., Anno., 4 ALR2d 348 17
41 Am. Jur., Pleadings, §89, page 353 11
1B Moore's Federal Practice ¶0.408, page 951, 952 26
3 Moore's Federal Practice ¶23.06, page 3423, 3424, 3425 ..... 30, 31
3 Moore's Federal Practice ¶23.07, page 3425, 3426 ....33, 34

IN THE SUPREME COURT
of the
STATE OF UTAH

RAY TANNER AND EDGAR L. VANCE for themselves and as a class action on behalf of all persons similarly situated,

Plaintiff-Appellants

vs.

INTERMOUNTAIN FARMERS ASSOCIATION, aka UTAH POULTRY AND FARMERS CO-OPERATIVE, a Utah corporation,

Defendant-Respondent

Case No. 10306

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Alleged class and individual action against defendant agricultural co-operative association. Eight conglomerate "Causes of Action," all of which incorporate each other, variously pray for accounting to determine ownership interests, redetermination and reallocation over the years of net profits or "margins," determination of the reasonableness of reserves and requirement to issue "Certificates of Interest" relating thereto, redetermination of amounts due to producers who have ceased to produce products, restraint from further distribution of Certificates of Interest and patronage credits or redemption thereof, liquidation of the business and

assets of the defendant co-operative, attorneys' fees and other relief. The relief sought would require fundamental reconstruction of past distributions, the accounting procedure, and basic changes in the entire method of doing business going back over the some forty-two years of defendant co-operative's existence, and the two plaintiffs purport to represent the interests of the thousands of defendant's patrons, producers and members over that unlimited time period.

DISPOSITION IN LOWER COURT

The district court, after argument on special setting for the third time, granted with prejudice defendant's Motion to Dismiss plaintiff's designated "Second Amended Complaint" on the several grounds and in all particulars set forth in defendant's said Motion to Dismiss.

RELIEF SOUGHT ON APPEAL

Defendant seeks affirmance of the lower court's order dismissing the "Second Amended Complaint" with prejudice, both as to the individually named plaintiffs and as to the "class" action aspect thereof.

STATEMENT OF FACTS

It is necessary to correct some misleading statements set forth in Appellants' Brief, and to add certain facts and matters from the Record. To begin with, two additional items inadvertently omitted by the Clerk of the lower court have been added and certified to this Record. These are the original min-

ute entry dated March 20, 1964, dismissing plaintiffs' Complaint, (now R317) referred to as merely an "alleged" minute entry (Appellants' Brief, p.17), and the certified copy of Articles of Incorporation and other corporate documents of the defendant Intermountain Farmers Association which was submitted to the trial court, (now R318-403).

The defendant company was organized in 1923 as an agricultural co-operative association pursuant to the Utah Statute (Utah Code Ann. 1953, 3-1-1 et seq). Over a decade ago, plaintiff Tanner did business with and patronized the defendant, then known as Utah Poultry & Farmers Cooperative. The plaintiff Tanner presented a full range of grievances against the defendant in "an inordinantly protracted trial" in 1962 which resulted in a judgment of dismissal on the merits, affirmed by this Court on appeal (Tanner v. Utah Poultry & Farmers Coop., 15 U2d 145, 389 P2d 62 (1963)). The lower court's Findings and Conclusions in that case are included in this Record (R46-59). Plaintiff Tanner now purports to sue personally and to represent others in a "class" action as to at least some of the matters and things adversely decided against him in the prior litigation. Tanner hasn't done business with the defendant co-operative since 1955 (R255), and neither the plaintiff Tanner nor the plaintiff Vance have been "members" or "producers" or done business with the co-operative since before the previous Tanner litigation in 1962 (R300).

The present action generally has to do with alleged property interests in the physical assets,

Certificates of Interest or other patronage credits, and alleged "unreasonable" reserves of the defendant co-operative association. In the determination of some of these matters, it is important to ascertain whether persons claiming property interests are qualified "members" of the Association. Membership each year is based upon patronage, and such membership will vary from year to year depending upon whether or not the required business or patronage is maintained. (R382—Article X). Thus, going back to the inception of the co-operative in 1923, a different "class" of persons constitutes the membership of the association each year. Particular rights and benefits are granted to those who currently use the Association's facilities (R382—Article XI and Article XIV). Property interests in the physical assets or residue thereof upon dissolution are restricted to "members" of the Association (R382—Article XIII and Article XIV; cf R236, and see contrary assertion with respect to this matter contained in Appellants' Brief, pp. 2 and 3); patronage credits are issued to both "members" and "patrons", but these are redeemable only upon a determination by the Board of Directors of the Association that the company is in a financial position to "revolve" or redeem such patronage credits (R382—Article XI). Reasonable reserves are permitted to be maintained (R382—Article XII), and Mr. Tanner has already unsuccessfully litigated the matter of a purported interest in such reserves by claiming that there had been accumulated unreasonable reserves in the prior litiga-

tion. This matter is considered in more detail under the heading of Res Judicata.

In the present litigation, plaintiffs Tanner and Vance have not and apparently cannot in repeated attempts allege a legal interest or standing sufficient to set forth a claim upon which relief can be granted. In addition to failing to set forth a claim for relief, all three versions (plus two additional amendments) of plaintiffs' Complaint failed to set forth "simple, concise and direct" allegations, and have been vague, indefinite and redundant in violation of the Utah Rules of Civil Procedure and directions of the Court permitting amendment to correct defects.

The original Complaint (R1-9) was filed on January 29, 1964 with six persons as named plaintiffs. By "Amended Complaint" (R10), one of the plaintiffs was deleted, and by "Notice of Dismissal" three more of the original plaintiffs dismissed the action as to themselves (R12). Motions to Dismiss (R20-22) and for More Definite Statement (R14-19) were argued before the court on March 20, 1964 (R151-152), and an order of dismissal was entered as a minute entry by Judge Stewart M. Hanson as follows:

> "Defendants Motion to Dismiss granted and the plaintiff is given to May 1, 1964 to amend and it is suggested that in preparing the amended complaint that plaintiff follow Motion for More Definite Statement." (R317)

An "Amended Complaint" was filed on May 18, 1964 (R27-38). While this cured the fatally incon-

sistent approach of the initial complaint which combined a stockholders derivative action with a class action, by abandonment of the stockholders derivative aspect thereof, the allegations otherwise were very similar to the allegations of the original Complaint as well as the allegations carried through into the subsequent "Second Amended Complaint." Defendant filed a Motion to Dismiss (R42-45) on several grounds, including failure to set forth a legal interest or standing to sue. Once more an alternative Motion for More Definite Statement was filed (R61-65) pointing out the substantial impossibility of framing a responsive pleading to the indefinite allegations which had omitted reference to the nature of any alleged interest in the plaintiffs, the time of the existence thereof, and other essential matters. These motions were again argued fully before Judge Stewart M. Hanson who again entered an order of dismissal (R76) and filed a Memorandum Decision dated July 7, 1964 (R78). The Memorandum Decision stated in part:

> "The matter was fully argued and submitted, and the Court now being fully advised in the premises finds that the motion to dismiss, pursuant to Ground 1 of said motion, should be granted, and the plaintiffs given such time as they desire to amend, if they desire to amend." (R78).

(Ground 1 of the Motion to Dismiss referred to in the Memorandum Decision was for failure to "specify any interest or grounds upon which the plaintiffs

or either of them has a legal interest or standing to sue the defendant in this action.") (R42).

Argument concerning the failure of plaintiffs to assert a legal standing or interest was not aimed "primarily" at the failure to include matter in the introductory paragraph within the body of the allegations of the Complaint, as is asserted in Appellants' Brief (p. 6). It was made very clear in argument that the objection was and is fundamental and that nothing, even in the gratuitous opening paragraph, indicates the nature of any alleged interest in the plaintiffs. (R196; cf R289). Contrary to the absolutely incorrect suggestion in Appellants' Brief (p. 7) that Judge Hanson's ruling (R78) precluded further attack of the complaint by "similar prior motions," Judge Hanson made it very clear in vacating plaintiffs' ex parte order which attempted to enlarge upon his Memorandum Decision and ruling (R79-80) that the ruling would speak for itself and would stand as originally written (R81, 82; cf R83, 84).

The "Second Amended Complaint," which is the complaint now before the Court, wasn't filed until September 1, 1964 (R87-99). This actually constituted the fourth change or amendment since the original Complaint was filed January 29, 1964. Notwithstanding having taken the generous leave granted by the Court to amend in order to recast the pleading so as to show, if possible, a sufficient legal interest or standing, the "Second Amended Complaint" was a virtual verbatum copy of the previous

defective "Amended Complaint." The only distinction is that the introductory paragraph as previously set forth in the Amended Complaint was simply repeated in the body of the allegations of the Second Amended Complaint. (Compare R27 with R87, 88; cf R213). Defendant's Motion to Dismiss the Second Amended Complaint (R111-131), argued on a special setting basis (R135, 136), was granted with prejudice as to all grounds and particulars thereof (R137, 138).

ARGUMENT

POINT I

TRIAL COURT'S JUDGMENT OF DISMISSAL WITH PREJUDICE SHOULD BE AFFIRMED AS TO THE INDIVIDUAL PLAINTIFFS.

Plaintiffs' Second Amended Complaint was dismissed with prejudice pursuant to motion authorized under Rule 12(b)(6) of the Utah Rules of Civil Procedure for "failure to state a claim upon which relief can be granted," and in accordance with other applicable Rules including Rules 8(a), 8(e), and 41(b). Comments in Appellants' Brief relative to *demurrers* under Rule 7(c) (Appellants' Brief p. 8), raising affirmative defenses in *pleadings* under Rule 8(c) (Appellants' Brief p. 10), and *capacity* (not interest or standing) to sue under Rule 9(a)(1) (Appellants' Brief p. 10) are clearly inapplicable. It is submitted that an affirmative *pleading* is not required under the Rules in order to attack a com-

plaint on the ground of an insufficiency of interest or standing to sue.

It should be noted that Defendant's Motion to dismiss the Second Amended Complaint was granted "in all particulars" (R138). There were several grounds for dismissal asserted in said motion, any of which will support affirmance of the trial court's action. In this connection, this Court stated in Waters vs. Waters, 100 Utah 246, 248, 113 P2d 1038 (1941):

> "Neither the order of the court sustaining the demurrer nor that of dismissal indicates upon which of several grounds thereof the demurrer was sustained. It, therefore, becomes necessary to examine the petition in the light of both the general and special objections to its sufficience, *since the ruling of the lower court will be upheld if it properly sustained the demurrer on any of such grounds, the presumption being that it ruled upon that ground.*" (Emphasis added.)

Similarly, this Court stated in Burningham v. Burke et al, 67 Utah 90, 100, 245 P 977 (1926):

> "Though the court erred in granting the motion (for nonsuit) on the particular ground on which it was granted, still, if it ought to have been granted on one or more of the other grounds stated in the motion, the ruling nevertheless must be upheld."

Another proposition of law of importance relative to this matter is the oft recognized concept that granting or refusing to grant permission to file

repeated amendments is within the sound discretion of the trial court. Accordingly, the decision of a trial judge with regard to such matters should not be overturned unless there is shown an abuse of discretion. Thus in Shall v. Henry, 211 F2d 226 (CA 7, 1954), the court upheld a refusal to permit amendment after repeated unsuccessful attempts to state a claim, and said:

> "In view of the many amendments to the complaint permitted by the court and the voluminous pleadings filed as a result, even though the right to amend is to be construed liberally, we think the court did not abuse its discretion in denying . . . application to amend still further. There must be an end sometime to applications to amend. Plaintiff had five chances to state his case. Under the circumstances disclosed by the record, there was no abuse of discretion in this respect." 211 F2d at 231.

A. COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO SET FORTH A LEGAL INTEREST OR STANDING TO SUE

Rule 8(a) requires that a claim be set forth ". . . *showing that the pleader is entitled to relief;* . . ." (Emphasis added). In the case before the court, plaintiffs set forth three times "Causes of Action" which did not allege any legal interest in themselves to sue the defendant. A close reading of the Second Amended Complaint fails to show, whether in the introductory paragraph or in paragraph

of the alleged First Cause of Action, or elsewhere, a legal interest or standing in the named plaintiffs to sue. This is contrary to the fundamental proposition of law that where a property interest or ownership in the subject matter of the action is sought, the pleader must set forth his alleged interest:

> *"Obviously where the right of the plaintiff to recover depends on his ownership, title, possession, or right of possession of the subject matter of the action, there must be in his declaration or complaint a sufficiently full and particular averment thereof . . .*
> "A plaintiff must allege the performance or fulfillment of *all conditions precedent* upon which his right of action depends, or show sufficient legal excuse for failure or nonperformance, or a waiver thereof . . ." 41 Am Jur., Pleadings, Section 89, page 353. (Emphasis added)

In the case of Heathman vs. Hatch, 13 U2d 266, 268, 372 P2d 990 (1962), this court observed that:

> "The objective of these rules is to require that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty *so that it can be determined whether there exists a legal basis for the relief claimed;* and if so, so that there will be a clearly defined foundation upon which further proceedings by way of responsive pleadings and/or trial can go forward in an orderly manner." (Emphasis added)

In State vs. California Packing Corporation 105 Utah 182, 141 P2d 386 (1943), this court re-

jected as defective an amended complaint which failed to show facts indicating a right to sue:

> "Do such allegations state a cause of action? As is so often said, to state a cause of action a complaint must show: A *primary right existing in the plaintiff;* a primary duty with regard thereto imposed by law on the defendant; a delict by defendant in his duty with respect to plaintiff's right . . . The amended complaint fails to show or plead any facts sustaining a necessary inference to show that plaintiff had a primary right to have the waters of Mill Race Ditch unpolluted; it also fails to show any duty owed by defendant to plaintiff with respect to the waters of Mill Race Ditch, or that defendant did anything it did not have a right to do." 105 Utah at 185, 189. (Emphasis added)

The Fifth Circuit Court of Appeals has held that it is not abuse of discretion for the District Court to dismiss a complaint with prejudice where it appears that no amendment could cure the defect in question. Accordingly, an order granting a Rule 12(b)(6) motion with prejudice was upheld as within the trial court's discretion. Feinberg vs. Leach 243 F2d 64 (CA5, 1957). In that case, the court regarded as one of the evidences of the apparent incurability of the complaint the fact that the plaintiff had attempted by *three* different complaints to state a claim and failed.

A striking case of importance both as to the individual and class aspects of the present action is Farmers Co-operative Oil Co. v. Socony-Vacuum Oil

Co., 43 F Supp 735 (ND Iowa 1942), modified, 133 F2d 101 (CA 8, 1942), remanded, 51 F Supp 440 (1943). In that case, the plaintiff co-operative association brought a class action alleging conspiracy under the Clayton Act in the control of prices of gasoline in a certain area. The alleged conspiracy was asserted to have caused the plaintiff association to raise the price of gasoline to its members by 2¼ cents per gallon. The trial court granted defendant's Motion to Dismiss, holding that the case was not a proper class suit and that the real parties in interest were the members of the co-operative and not the co-operative itself. (43 F Supp 735). The Court of Appeals affirmed that ruling, but held that the trial court should have permitted the plaintiff to amend and show any cause of action pertaining to itself as a corporate entity. (133 F2d 101). Accordingly, plaintiff, on remand, amended its original Complaint and claimed all of the damages to itself. The trial court dismissed that complaint also, but granted leave to file an amended pleading, which would set forth specifically and factually its damages, as distinguished from the damages of its members. Once again plaintiff amended its complaint, whereupon the trial court dismissed with prejudice. The court said:

> "I conclude that defendants' Motion to Dismiss is well taken upon either ground: First, that the pleading does not state a claim upon which relief can be granted, because the damage complained of is entirely *conjectural and impossible of proof* . . . Second, it was

> finally determined on the first appeal who were the *real parties in interest* . . .
> "I conclude that the motion must be sustained upon each of the grounds interposed, and I am of opinion that plaintiff having had *three opportunities to state a cause of action* and failed, that *leniency is now exhausted*, and that *the case should be dismissed*, and it is so ordered." 51 F Supp at 442 (Emphasis added).

It seems clear that the trial judges in the case before the court regarded it as improbable that future amendments could cure the defect for which the complaints were dismissed. Thus, in the Memorandum Decision of Judge Hanson dismissing the "Amended Complaint," *unlimited time* was granted to plaintiffs to amend "if they desire to amend." (R78) The fatal nature of the defect was repeatedly argued in court, and it was stipulated by counsel for plaintiffs that the parties before the court claim no present membership interest as producers or current patronage interest in the defendant co-operative (R300). It was also candidly noted that the action itself was not "particularly" brought on behalf of the named plaintiffs but rather for the class (R227; cf R244). Under the state of facts in this Record, it was not error to dismiss the "Second Amended Complaint" with prejudice, since after several attempts to amend it still failed to state a claim showing that plaintiffs were entitled to relief as required by Rule 8(a).

B. COMPLAINT WAS PROPERLY DISMISSED FOR FAILURE TO COMPLY WITH OTHER UTAH RULES OF CIVIL PROCEDURE AND PRIOR ORDERS OF COURT

Rule 41(b) provides:

> "For *failure of the plaintiff* to prosecute or *to comply with these rules or any order of court,* a defendant may move for dismissal of an action or of any claim against him . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an *adjudication upon the merits.*" (Emphasis added.)

Among other grounds, the Motion to Dismiss Plaintiff's Second Amended Complaint (see R112, 113) attacked that pleading under Rule 41(b) for failure to comply with certain Utah Rules of Civil Procedure as well as the court's directive that subsequent amendments should follow requirements set forth in Defendant's Motion for More Definite Statement.

1. *Failure to Comply with Court Order.*

Judge Hanson entered the following order in dismissing plaintiffs' "original" (although twice amended) complaint:

> "Defendants Motion to Dismiss granted and the plaintiff is given to May 1, 1964 to amend

> and it is suggested that in preparing the amended complaint that plaintiff follow Motion for More Definite Statement." (R317)

A striking case similar in many respects to the facts of this case is Blake v. DeVilbiss Co., 118 F2d 346 (CA6, 1941). That case was an action for injuries caused by diseases resulting from an employer's negligence. Some seventeen respiratory diseases and seven or eight organic diseases were claimed to have been inflicted upon the plaintiff for failure to furnish pure air to breathe and other negligent omissions. The trial court regarded the petition in question as "not sufficiently definite or certain to apprise the defendant of the basis for the relief claimed or to permit a recovery," but permitted amendment on condition that such should avoid "prolixity and surplusage" and should state precisely the claims and grounds of negligence upon which recovery was relied. Amendments were made in due course but these were "equally prolix and indefinite not only in respect to specific diseases suffered and the acts of negligence complained of but also to the time or place of their commission and their approximate relations to the injury." A subsequent amendment was subject to the same infirmities. A motion interposed under Rule 41(b) was granted and the complaint was dismissed with prejudice for failure to comply with the order of the court requiring definite and certain allegations, as well as failure to conform with Rule 8(e) of the Federal Rules of Civil Procedure. The appellate court affirmed the judgment of dismissal.

That a court has inherent power to order dismissal of an action with prejudice where amendments fail to comply with the court's rules of proceedings and/or orders is clearly affirmed in Feight v. Mathers et al., 153 Nebraska 839, 46 NW 2d 492. (1951). The rule is summarized in an annotation in American Law Reports:

> "It is obvious that the power and authority of a trial court to compel obedience to orders relating to the plaintiff's pleadings is necessary to attain orderly and prompt disposition of pretrial proceedings. Recognizing this fact, the courts in jurisdictions adopting or allowing dismissal of a plaintiff's action as a proper punishment or coercive measure have uniformly held or recognized that an action, *in the discretion of the trial court*, may be dismissed because of the *disobedience of an order relating to pleadings filed, or to be filed*, by the plaintiff." 4 ALR 2d 348, 352. (Emphasis added).

The direction of the court to the plaintiffs in DeVilbiss to define their claims and grounds, thereby avoiding prolixity and surplusage, was, in effect, the same direction and suggestion made to plaintiffs in this case by Judge Hanson in his order of March 20, 1964 (R317). Judge Hanson's order required Plaintiffs to follow the Motion for More Definite Statement, which motion pointed out in specificity the matters and things essential in order to enable defendant to frame a responsive pleading. (R14-19; cf R61-65 and R100-104). Counsel for Appellant regards Judge Hanson's directive as "no more than a

suggestion" which "does not constitute an order" (Appellants' Brief p. 17), but that kind of "suggestion" is precisely the sort of order which is common with reference to attempts to refile in conformity with Rule 8. Thus, in Walter Reade's Theaters v. Loew's Inc., 20 FRD 579 (SDNY, 1957), the following "suggestion" was made:

> "Accordingly, the complaint is stricken with leave to plaintiff within 20 days to file an amended pleading which contains simple, concise, and distinct averments in conformity with Rule 8 of the Federal Rules of Civil Procedure. The amended complaint should avoid the infirmities of the present complaint herein referred to." (20 FRD at 582).

It seems clear that the foregoing "suggestion" amounted to an "order," which if not followed would be subject to attack under Rule 41(b). The directive or "suggestion" in DeVilbiss was certainly so regarded, and properly so. Judge Hanson's "suggestion" should also be so regarded.

2. *Failure to Show Cause for Repeated Amendments—Rule 15(a)*

Rule 15(a) provides in part that:

> "A party may amend his pleading *once as a matter of course* at any time before a responsive pleading is served . . . Otherwise, a party may amend his pleading *only by leave of court* or by written consent of the adverse party; and leave shall be freely given *when justice so requires.*" (Emphasis added.)

Cases construing Rule 15(a) where leave to file repeated amendments is sought are pertinent to this situation. Rulings in this regard are entirely *discretionary*, the public policy and reasoning behind refusal to grant such amendments generally being that there must be an end to litigation at some point. See Shall v. Henry, 211 F2d 226 (CA7, 1954).

A case which stands for the proposition that repeated amendments will not be allowed in order to state a cause of action when previous complaints have failed on that very ground is Laughlin v. Garnett, 138 F2d 931 (CADC, 1943) cert den 322 US 738. That case was an action for malicious prosecution against two United States Attorneys and a police officer wherein practically all of the activities described in the complaint were part of the official duties of those officers. The trial court refused to permit plaintiff to file a third amended complaint in which knowledge of instigation of false charges was alleged, as was knowing preparation and presentation of forged documents to a grand jury in order to obtain false indictments. The Court of Appeals for the District of Columbia upheld the trial court's discretion in refusing further amendment, and said:

> "Under Rule 15(a), of the Federal Rules of Civil Procedure, after responsive pleadings have been filed a party may amend only by written consent of the adverse party or by leave of court when justice so requires. Since the complaint before us is the *fourth unsuccessful attempt of appellant to set out a cause*

> *of action* against appellees, we believe that the court properly denied further amendment." 138 F2d at 932 (Emphasis added).

It is well established that granting or denying proferred amendments is within the sound discretion of the trial court. Thus, refusal to grant leave to amend is not ground for reversal except for abuse of discretion. (Frank Adam Electric Co. v. Westinghouse Electric Mfg. Co., 146 F2d 165 (CA8, 1945). The inquiry in reviewing the trial court's action in such cases is confined to circumstances which clearly show an abuse of discretion, in the nature of arbitrary action. (Hartford-Empire v. Obear-Nester Glass Co. 95 F2d 414 (CA8, 1938). See also N.L.R.B. v. Guernsey-Muskingum Electric Co-op, Inc., 285 F2d 8, 11 (CA6, 1960) and Kirsch v. Barnes, 157 F Supp 671 (DC 1957) aff'd 263 F2d 692 (CA9, 1959). It is said that a court's ruling on whether or not to grant amendments after the first will be disturbed only upon *gross abuse* of its power. Heay v. Phillips, 201 F2d 220, (CA9, 1952).

Some considerations which may justify refusal to permit amendment were discussed at length in Friedman et al v. Trans-American Corporation, 5 FRD 115 (DADel, 1946). In that case the court was confronted with a proferred amendment for the fourth time, several months after the original complaint was filed, which amendment contained no essentially "new" matter. The motion to amend was denied, and the court said:

"Rule 15(a) provides that leave to amend shall be freely given when justice so requires. The word "freely" was used with deliberate intention to obviate technical restrictions on amendment. Moore, Federal Practice, p. 806. *But, this does not mean that leave to amend is to be granted without limit;* otherwise, the right to amend would be absolute and not rest in the *discretion* of the court. *The interests of both parties should be considered when an application to amend is made.* Opportunity should be given to a plaintiff to present his alleged grievance; *yet equal attention should be given to the proposition that there must be an end finally* to a particular litigation . . . In short, the matter of giving leave to amend is one in the *sound discretion of the nisi prius court. I agree with Judge Rifkind that "Rule 15(a) prescribes a liberal policy in granting leave to amend." But "a liberal policy" does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. Here, I believe we have such an instance. This is plaintiffs' fourth attempt to state their cause of action and their third request to amend,* more than sixteen months after the complaint was filed." (5 FRD at 116. Emphasis added).

3. *Failure to File Clear and Comprehensible Pleading—Rule 8(e)*

Rule 8(e) requires that averments in pleadings be "simple, concise, and direct." In the DeVilbiss case, supra, the court made specific reference to

the fact that the defective pleading, which was finally dismissed with prejudice, "does not conform to Rule 8(e)(1) of the federal rules." (118 F2d at 347). Similarly, the court observed in Strahle-Johnson Supply Co., 1 FRD 279 (ED Tenn, 1940) that "The letter and spirit of the Rules of Civil Procedure *requires* simple, concise, and direct denials, admissions, and averments in pleadings." (Portion of answer stricken on trial court's own initiative.) It is clear that the determination of whether there has been reasonable compliance with the rules, including Rule 8(e), must rest with the trial court's discretion. Carrigan v. California State Legislature, 263 F2d 560 (CA9, 1959), cert den 359 U.S. 980.

In the case at bar, the pleadings on file are anything but "simple, concise and direct." They are actually a conglomerate of averments, unlimited in scope as to time, persons or otherwise. They are imprecise as to the nature of any alleged injury. A good example is the introductory paragraph of both the "amended" and "second amended" complaints, the inclusion of which into affirmative allegations appellants rely upon as setting forth an adequately pleaded interest. Actually, however, the long and involved sentence structure is never completed into a full English sentence. (See R87, 88.) Similarly, "various years" and "times material" are referred to, but no actual reference of a concise nature appears so as to enable a responsive pleading by way of affirmative defense or otherwise. As a result of the gross violations of Rule 8(e) and Rule 12(c), relat-

ing to immaterial and redundant matter, motions to strike (R23, 24; R66-68; R105-110) were filed setting forth in particularity the complained of defects under Rule 8(e). These were companion motions to the Motions to Dismiss and For More Definite Statement, and while not granted directly, contain in some detail the specification of defects pertinent to Rule 8(e), the violation of which was one of the grounds for granting the Motion to Dismiss.

C. THE COMPLAINT WAS RES JUDICATA AGAINST THE PLAINTIFF TANNER, AND THEREFORE WAS PROPERLY DISMISSED AS TO HIM.

Despite counsel for Appellants' claim that this question is not properly before the court (Appellant's Brief p. 16) it is submitted that having attached the Findings and Conclusions to the Motion to Dismiss (R117-130) such became properly before the court in the nature of an affidavit or information in support of the motion. While Rule 8(c) permits raising the defense of res judicata in pleadings, it certainly doesn't preclude raising the defense by a Rule 12(b)(6) Motion. In any event, this is a matter as to which the court can take judicial notice since it involves the Supreme Court of Utah's own decision in a case previously before it, embracing Findings and Conclusions referred to therein.

It is submitted that the entire Complaint as to the plaintiff Tanner should in any event be dismissed as res judicata. The Third Cause of Action in Plaintiff's Second Amended Complaint most clearly comes

within the doctrine, however. To the extent that that cause of action is incorporated in the other causes of action, they would very clearly also be res judicata. The Third Cause of Action has to do with an alleged property interest of the plaintiffs in an accumulation of unreasonable reserves. The fact of the matter, however, is that Ray Tanner had fully presented this matter in the previous litigation and the court found that no reserves had been established which were unreasonable. Accordingly, that aspect of the Complaint of Mr. Tanner in the previous litigation was dismissed *with prejudice*. See Finding No. 6 (R121) and Conclusion No. 1 (R129) and No. 3 (R130). This is important not only in regard to the propriety of a personal action as to such matters by Mr. Tanner, but also with respect to his representative capacity or lack of it in connection with the class aspect of the litigation.

It is clear also in the previous litigation that the trial court ruled that the interest and standing of the plaintiff Tanner was such that he was guilty of laches, and the causes of action asserted were barred by the statute of limitations, and other defenses. (R129).

The doctrine of res judicata is broad enough to embrace all matters which were expressly litigated as well as matters and things which could have been raised and adjudicated. Thus in East Mill Creek Water Co. v. Salt Lake City, 108 Utah 315, 321, 322, 159 P2d 863 (1945) this court pointed out that if a second case is between the same parties or their

privies, and the claim, demand or cause of action is the same in both cases, the doctrine of res judicata "applies not only to points and issues which are actually raised and decided therein *but also to such as could have been therein adjudicated* . . . In such case the courts hold that *the parties should litigate their entire claim, demand and cause of action, and every part, issue and ground thereof*, and *if one of the parties fails to raise any point or issue or to litigate any part of his claim*, demand or cause of action and the matter goes to final judgment, *such party may not again litigate that claim*, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action." (Emphasis added).

Again, in Wheadon v. Pearson 14 U2d 45, 47, 376 P2d 946 (1962), this Court said:

> "Policy would seem to indicate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire claim, then the matter should be laid at rest. *He should be denied a second attempt at substantially the same objective under a different guise.*" (Emphasis added)

(See also Stillinovich v. Ottilia Villa, Inc., 14 U2d 222, 381 P2d 210 (1963).)

Appellants insist that the issue of res judicata can be raised only in a pleading under Rule 8(c). This position is contrary to what appears to be the weight of authority and the better reasoned cases. Professor Moore has summarized the rule:

> "It should now be clear, however, that the defense of res judicata can be . . . raised by motion to dismiss for failure to state a claim since the court may treat such a motion as a motion for summary judgment." 1B Moore's Federal Practice 951, 952. Accord, Hartmann v. Time, 166 F2d 127, 138 (CA3, 1947).

In Florasynth Laboratories, Inc. v. Goldberg, 191 F2d 877 (CA7, 1951), the court upheld a judgment of res judicata based upon a Rule 12(b)(6) motion in which prior court findings and conclusions were referred to.

Counsel for appellants assert that no claim of plaintiff Tanner is res judicata, but concede that the issue could well apply to the reasonableness of reserves (Third Cause of Action), if such were properly raised in an affirmative *pleading*. (Appellant's Brief p. 16). At the same time, comfort is taken in the assertion that the question of reallocation of "margins" wasn't expressly presented in the prior litigation. It is submitted that based upon the previous ruling in which plaintiff Tanner was held to have no valid claim of any kind against the defendant co-operative, all of his claims being dismissed with prejudice (R130), coupled with the doctrine that any other claims he conceivably could assert should then have been raised and litigated, the entire action should be dismissed with prejudice in any event against the plaintiff Tanner.

POINT II

THE TRIAL COURT'S JUDGMENT OF DISMISSAL WITH PREJUDICE SHOULD BE AFFIRMED AS TO THE CLASS ACTION

It is fundamental that the "class" aspect of the present action must fall if the individual action fails. The reason for this, of course, is that if the individual plaintiffs do not possess rights or interests sufficient to maintain this action for themselves, they most certainly do not possess additional rights by some magic in order to maintain a "class" suit. Thus, in Pacific Inter-Club Yacht Assn. vs. Morris, 197 FSupp 218 (ND Calif, 1960), 288 F2d 886 (CA 9, 1961), it was held that where no individual would have standing to enjoin the creation of a bridge without a showing of special damage to himself, the mere fact that the suit was brought under Rule 23 in the name of 9,000 individuals who might seek to use the waterway over which the bridge was to be built could not create greater rights in the group than a single individual would have.

In the case at bar, it appears that plaintiffs hope to "pull themselves up by their boot straps" and bolster their faltering individual interest and standing by asserting through counsel that the action was not "particularly" brought for those plaintiffs, but rather for the "class" (R 227). This appears to be a spurious argument.

A. *No Common "Class" is Defined or Delineated.*

Rule 23(a) permits a representative action on behalf of ". . . *persons constituting a class. . . .*"

The immediate problem is, what persons constitute the "class" which plaintiffs claim to represent? As pointed out in the recitation of facts herein, the Articles of Incorporation of the defendant co-operative association contemplate that membership in the association shall be based upon patronage with the association *each year*, and such membership varies from year to year depending upon whether or not a minimum amount of business or patronage is maintained (currently $500.00 per annum. See R 382—Article X). In fact, there is a different "class" of persons having an interest in the "margins", reserves, and other assets of the association from year to year, depending upon patronage. It is also a fact that the defendant co-operative association has been divided into distinct and separate departments, each of which constitutes a separate "class" of persons. These departments serve both *purchasing* (Farm Supply, Feed Sales and Processing, and Fertilizer Sales) and *marketing* (Egg Processing and Sales, Poultry and Turkey Processing) functions of the co-operative. Since in any year a profit may be realized in one or more of the departments, while a loss may be sustained in other departments, the patrons of the "profit" departments may have interests adverse to or inconsistent with the patrons of "loss" departments in the matter of allocation of the net "margins". Plaintiffs demand a re-allocation of past patronage refunds based upon an interpretation

which would in effect lump the "profit" departments with the "loss" departments, thereby spreading the "margins" without reference to the departmentalized *source* of the creation of such "margins". (R 273). This is incompatible with the manner and method of accounting and allocation carried on by the association in the past, and would unquestionably prejudice the many members and patrons to whom have been allocated certificates of interest and other patronage credits on a departmentalization basis.

The complaint in this action fails to identify or describe a common "class" of persons purportedly represented herein, except by lumping the "tens of thousands" (R 287) of patrons and members since inception of the co-operative as the "only one class" who own some sort of "undivided interest" in the "mass of assets" over the years. (Appellants' Brief p. 14; cf pp. 4, 5). In seeking to require a re-allocation of past patronage refunds, plaintiffs herein lump together all members and patrons without reference to *source* of business and patronage, which has the effect of putting into one conglomerate mass incompatible and antagonistic interests. As a result, there is nowhere set forth a "class" within the meaning of Rule 23.

The *assertion* of the existence of a "class" doesn't create one:

> "By definition, an essential prerequisite to a class action *is the existence of a "class"* . . . An action, of course, is not a class suit merely be-

> cause it is designated as such in the pleadings; whether it is or is not depends upon the *attending facts*. But the complaint, or other pleading initiating the class action, *should allege the existence of the necessary facts*, i.e., *the existence of a class*, . . ." 3 Moore's Federal Practice 3423, 3424. (Emphasis added.)

It is well established that the interests of persons purportedly representing a "class" must be compatible with and not antagonistic to the interests of the "class" represented (Hansberry vs. Lee, 311 U.S. 32 (1940)). A fortiori, where a conglomerate of several categories of persons, some categories of which have interests not wholly compatible with or antagonistic to the interests of the others, are lumped together.

B. *Plaintiffs Do Not Belong to the "Class".*

Rule 23, in authorizing class suits, permits the action to be brought only by "*such of them*", referring to "*persons constituting* a class." Plaintiffs must *belong* to the "class" they claim to represent, and their interest and right as such members of the class must be pleaded. See Clark vs. Chase National Bank, 45 FSupp 820 (SDNY, 1942) and Hicky vs. Illinois Central R. R., 278 F2d 529 (CA 7, 1960). This Court has recognized that Rule 23 requires the persons who are suing on behalf of the class to *belong* to the class. Thus, in Salt Lake City vs. Utah Lake Farmers Association, 4 U2d 14, 25, 286 P2d 773 (1955), Justice Wade observed that "Rule 23 only authorizes the defendants to represent a class of persons *to which they belong*. . . ." Professor Moore cites

many authorities for the proposition that ". . . the interest of the named representative . . . must be co-extensive with the interest of the other members of the class." 3 Moore's Federal Procedure 3427.

In the case at bar, the plaintiffs are not current "members" of the defendant co-operative association, and neither have belonged or done business with the association since before 1962 (R 300). (In the case of Plaintiff Tanner, not since 1955 (R 255). These plaintiffs do not have a co-extensiveness of interest with current members and patrons. Also their interest cannot be the same as the class of persons who allegedly *benefited* from the past allocations or patronage refunds. (See paragraph 1 of Plaintiffs' Second Amended Complaint. R 91.) It is clear that plaintiffs seek to recalculate past allocations, without regard to *source* of patronage *by departments* (R. 273). Their interests would certainly be incompatible and not co-extensive with the interests of the persons to whom patronage refunds have been allocated, and from whom plaintiffs would apparently seek to take such allocations away.

It is submitted that the plaintiffs have an antagonistic interest with many past patrons and members and could not belong to the same "class". By reason of that fact alone, this action cannot be maintained by these plaintiffs. The Supreme Court of the United States has set forth the guidelines thusly:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and *common interest* of the

> class in the litigation, is either to assert a *common right* or to challenge an asserted obligation. (Citing cases). It is quite another to hold that all those who are free alternatively either to assert rights or *to challenge them* are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for the purpose of litigation, whose *substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process required.*" Hansberry vs. Lee, 311 U.S. at 44, 45. (Emphasis added.)

C. *Plaintiffs Do Not Adequately Represent Any "Class".*

Rule 23 permits class actions to be brought only by such persons who constitute the class ". . . as will fairly insure the adequate representation of all. . . ." This matter was extensively dealt with in Salt Lake City vs. Utah Lake Farmers Association, 4 U2d 14, 286 P2d 773 (1955). In that case, this Court observed the distinctions under the rule between "true", "hybrid" and "spurious" class actions, and it was observed that as to each type of action the rule requires joinder of such persons as ". . . will fairly insure adequate representation of all members of the class." The considerations and factors with reference to a determination of adequacy of representation are discussed by Professor Moore as follows:

"In determining the question the court must consider (1) whether the interest of the named party is *co-extensive with the interests of the other members* of the class; (2) *whether his interests are antagonistic in any way* to the interests of those whom he represents; (3) the *proportion of those made parties* as compared with the total membership of the class; (4) any other factors bearing on the *ability of the named party to speak for the rest of the class;* and (5) the *type of class action involved*—whether true, hybrid, or spurious." 3 Moore's Federal Practice 3425. (Emphasis added.)

It seems clear that under *any* of the factors above referred to in judging adequacy of representation that the plaintiffs in this case fall far short of the mark. There is serious problem with regard to co-extensiveness of interest, since neither of the plaintiffs are current patrons or members and appear to claim rights different from those of patrons of some of the co-operative's departments; there is probable antagonism between the interests of these plaintiffs and the interests of many of the other producers they have conglomerated into the "class"; the proportion of representation based upon the "tens of thousands" of persons (R287) plaintiffs purport to represent would be de minimus. There are other serious factors adversely bearing upon the "ability of the named plaintiffs to speak for the rest of the class", particularly the res judicata matter relating to the Plaintiff Tanner.

An additional very serious matter bearing upon the propriety of representation here is the type of

class action involved. Counsel for appellants regards this suit as in the nature of a "true" or "hybrid" class action, and extensively so argued it (R228; R277). If this action is of the "true" variety, it would be absolutely binding upon all persons within the class and hence adequate representation would be extremely important:

> "The question of adequate representation is very important in the true class suit, for there, as we shall see, a judgment on the merits binds all the members of the class and adequate representation is essential to due process of law." 3 Moore's Federal Practice 3425.

While the "hybrid" suit is not technically binding upon all class members, adequacy of representation is nevertheless an important issue:

> ". . . a court has a duty to see that its processes are not abused, that the action is not a mere collection device to promote the plaintiff's individual interests, . . . To this extent the court may properly scrutinize the plaintiff's claim of representation." 3 Moore's Federal Practice 3426.

The "spurious" class action is really a mere permissive joinder device, no one being bound except the original plaintiffs and interveners. The matter of basic propriety and desirableness of such joinder, as is the case in all "class" actions, is of course within the sound discretion of the trial court. This Court has clearly pointed out the reasons why individual damage claims, and other claims of an individual na-

ture, are inappropriate for disposition under the "spurious" class action:

> "The individual damage claims of the members of this class are several and not common claims as are their claims for violation of their rights and for injunctive relief previously considered. They are spurious not true representation claims and come under subdivision (a) (3) and not (a) (1), of Rule 23 . . . *Such individual damage claims cannot be litigated by representation, they can only be litigated if the claimant is or becomes a party to this action, for such claims are dependent on individual factors not common to all members of the class and the defendants simply do not represent the other members of the class as to such individual claims.*" Salt Lake City vs. Utah Lake Farmers, 4 U2d at 25, 26. (Emphasis added.)

It is difficult to assign the designation of "true", "hybrid" or "spurious" to the kind of "class" action presented herein. It is believed that this action is fundamentally not a class action at all, and so the problem of designation of the variety of such action is not reached. However, it is submitted that by any of the designations that might be assigned to this action as a "class" action its maintenance would be inappropriate on the ground of inadequacy of representation. It should be remembered that this action was commenced with several plaintiffs (R1-9). By "Amended Complaint" (R10) one of the plaintiffs was deleted, and subsequently by "Notice of Dismissal" (R12) three more of the plaintiffs were

dismissed out of the action. This has left only plaintiffs Tanner and Vance purporting to represent the "tens of thousands" (R287) of the patrons who have an alleged interest in this lawsuit. It seems clear that these plaintiffs do not adequately represent any "class".

CONCLUSION

It is submitted that the trial court's judgment of dismissal with prejudice should be affirmed both as to the individual plaintiffs and with regard to the so-called "class" aspect of the complaint.

With regard to the individual plaintiffs, it is significant that in the three separate versions of complaints (plus two other amendments) no legal interest or standing to sue was ever directly asserted as to the plaintiffs. Certainly in the some ten months from the filing of the original complaint to final dismissal of the "Second Amended Complaint" there was sufficient time and ample opportunity to set forth the nature of any such interest. There was failure to comply with the court's directive to be more specific in defining the nature of the claims and interests of the plaintiffs. In addition, the Utah Rules of Civil Procedure were not followed in other particulars in that the complaints were not simple, direct, and concise, there was not shown any proper cause so as to justify repeated leave for amendments, and the amendments when filed failed to specify in a clear and comprehensible way the nature of any interest of the plaintiffs, the time period involved,

and other material essential to phrase a responsive pleading. In addition, the complaints were res judicata as to the Plaintiff Tanner.

With regard to the class action aspect of the complaints, it is submitted that such was properly dismissed for several reasons. To begin with, a common class of persons with co-extensive interests was never adequately or properly defined. In addition, it affirmatively appears in the Record that plaintiffs do not currently belong to any defined class, and as to the conglomerate "class" insisted upon, their claims and interests are in fact antagonistic to other persons within the same "class". In any event, the plaintiffs do not adequately represent any class of persons, whether such be denominated as "true", "hybrid" or "spurious".

It is submitted that the judgment of the lower court should be affirmed in all respects.

Respectfully submitted,

J. Thomas Greene
of Marr, Wilkins & Cannon

920 Continental Bank Building
Salt Lake City, Utah

Attorneys for Defendant-Respondent